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**CHAPTER 90
REGULATORY FLEXIBILITY**

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SUBCHAPTER A: PURPOSE, APPLICABILITY, AND ELIGIBILITY

§90.1, §90.2

Effective July 31, 2002

§90.1. Purpose.

The purpose of this chapter is to implement the commission's authority under Texas Water Code, §5.758, to provide regulatory flexibility to an applicant who proposes an alternative method or alternative standard to control or abate pollution; §5.127, relating to Environmental Management Systems; and §5.131, relating to Environmental Management Systems.

Adopted July 10, 2002

Effective July 31, 2002

§90.2. Applicability and Eligibility.

(a) Subchapter B of this chapter applies to any statute or commission rule regarding the control or abatement of pollution, except that it does not apply to requirements for storing, handling, processing, or disposing of low-level radioactive materials.

(b) Subchapter C of this chapter applies to any site that has an environmental management system (EMS) that meets the minimum standards in §90.32 of this title (relating to Minimum Standards for Environmental Management Systems).

(c) Except as provided in subsection (e) or (f) of this section, a person whose EMS for a specific site meets the minimum standards of §90.32 of this title may be eligible to receive regulatory incentives under this chapter.

(d) Except as provided in subsection (g) or (h) of this section, any person subject to any statute or commission rule regarding the control or abatement of pollution may be eligible to receive a regulatory flexibility order (RFO).

(e) A person who has been referred to the Texas or United States attorney general and has incurred a judgment against the site for which the person is requesting regulatory incentives, is ineligible to receive regulatory incentives at that site for using an EMS for a period of three years from the date the judgment was final.

(f) A person who has been convicted of willfully or knowingly committing an environmental crime regarding the site for which the person is requesting regulatory incentives is ineligible to receive regulatory incentives for using an EMS for a period of three years from the date of the conviction.

(g) A person who has been referred to the Texas or United States attorney general, and has incurred a judgment, is ineligible to receive an RFO for a period of three years from the date the judgment was final.

(h) A person who has been convicted of willfully or knowingly committing an environmental crime in this state, or any other state, is ineligible to receive an RFO for a period of three years from the date of the conviction.

Adopted November 20, 2001

Effective December 16, 2001

SUBCHAPTER B: GENERAL PROVISIONS
§§90.10, 90.12, 90.14, 90.16, 90.18, 90.20
Effective July 31, 2002

§90.10. Application for a Regulatory Flexibility Order.

(a) An application for a Regulatory Flexibility Order (RFO) must be submitted to the executive director.

(b) The application must, at a minimum, include:

(1) a narrative summary of the proposal, including the specific statutes or commission rules for which an exemption is being sought;

(2) a detailed explanation, including a demonstration as appropriate, that the proposed alternative is:

(A) more protective of the environment and the public health than the method or standard prescribed by the statute or commission rule that would otherwise apply; and

(B) not inconsistent with federal law, including any requirement for a federally approved or authorized program;

(3) documented evidence of the benefits to environmental quality that will result from the proposal;

(4) an implementation schedule which includes a proposal for monitoring, recordkeeping, and/or reporting, where appropriate, of environmental performance and compliance under the RFO;

(5) an identification, if applicable, of any proposed transfers of pollutants between media;

(6) a description of efforts made or proposed to involve the local community and to achieve local community support;

(7) an application fee of \$250; and

(8) any other information requested from the applicant by the executive director during the application review period.

(c) The application must be signed by the applicant or its duly authorized agent and must certify that all information is true, accurate, and complete to the best of that person's knowledge.

(d) The applicant shall submit an original and two copies of the signed application to the executive director for review, and shall send one additional copy to the commission's regional office for the region in which the facility is located.

Adopted July 10, 2002

Effective July 31, 2002

§90.12. Additional Fees; Cost Recovery.

(a) The executive director may determine that the application for a Regulatory Flexibility Order constitutes a significant and complex application for which the recovery of all reasonable costs for review and approval by the commission is appropriate. Upon notice to the applicant of such finding, the applicant shall execute a cost recovery agreement in a form approved by the executive director.

(b) Final consideration of an application by the commission is contingent on the applicant's agreement to pay the reasonable costs of review, as determined by the executive director.

(c) If an application is withdrawn prior to the commission's consideration of the application, the executive director may void the cost recovery agreement and retain the initial application fee.

(d) The executive director shall determine the commission's costs to administer this chapter, establish rates to recover those costs, and publish the rates in the *Texas Register*. The rates established under this section shall not exceed the rates established by the commission under Health and Safety Code, §361.613 or Chapter 333 of this title (relating to Voluntary Cleanup Programs).

Adopted August 26, 1998

Effective September 20, 1998

§90.14. Commission Action on Application.

(a) Commission action on an application under this chapter shall be consistent with the provisions set forth in Chapter 50, Subchapter B of this title (relating to Action by the Commission), as applicable.

(b) The commission may consider in its decision, among other factors, the applicant's compliance history and efforts made to involve the local community and achieve local community support.

Adopted August 26, 1998

Effective September 20, 1998

§90.16. Public Notice, Comment, and Hearing.

(a) The applicant shall comply with all public notice, comment, and hearing requirements associated with the statute or commission rule for which the applicant is seeking an exemption, except as provided in subsection (b) or (c) of this section.

(b) If the statute or commission rule for which an applicant is seeking flexibility does not require

public notice, or an opportunity for comment or hearing, the following requirements shall apply.

(1) The applicant shall publish notice at least once in a newspaper of general circulation in the county in which the facility is located or proposed to be located. The notice shall be published within 30 days after submittal of the application. Notice under this section shall not be smaller than that normally used in the newspaper's classified advertising section.

(2) The commission shall accept public comment for 30 days after the last publication of the notice of application.

(c) Alternative public notice.

(1) An applicant may request to provide public notice and an opportunity for comment or hearing in an alternative manner to the requirements of subsection (a) or (b) of this section.

(2) The executive director may authorize alternative public notice and participation opportunities if he determines that the alternative is reasonably likely to provide greater public notice and opportunity for participation than subsection (a) or (b) of this section.

(d) Notice under this section shall, at a minimum, include:

(1) a brief description of the proposal and of the business conducted at the facility or activity described in the application;

(2) the name and address of the applicant and, if different, the location of the facility for which regulatory flexibility is sought;

(3) the name and address of the commission;

(4) the name, address, and telephone number of a commission contact person from whom interested persons may obtain further information;

(5) a brief description of the public comment procedures, and the time and place of any public meeting or public hearing; and

(6) the date by which comments or requests for hearing must be received by the commission.

§90.18. Amendment/Renewal.

(a) An application for amendment or renewal of a Regulatory Flexibility Order (RFO) may be filed in the same manner as an original application under this subchapter.

(b) If renewal procedures have been initiated at least 180 days prior to the RFO expiration date, the existing RFO will remain in effect, and will not expire until commission action on the application for renewal is final.

Adopted August 26, 1998

Effective September 20, 1998

§90.20. Termination.

(a) By the recipient.

(1) A recipient of a Regulatory Flexibility Order (RFO) may terminate the RFO at any time by sending a notice of termination to the executive director by certified mail.

(2) The recipient must be in compliance with all existing statutes or commission rules at the time of termination.

(b) By the commission.

(1) Noncompliance with the terms and conditions of an RFO, Texas Water Code, §5.123, or any provision of this chapter, may result in the RFO being voided, except that the recipient of the RFO shall be given written notice of the noncompliance and provided an opportunity not less than 30 days from the date the notice was mailed to show cause why the RFO should not be voided. Procedures for requesting a show cause hearing before the commission shall be included in the written notice.

(2) In the event an RFO becomes void, the executive director may specify an appropriate and reasonable transition period to allow the recipient to come into full compliance with all existing commission requirements, including time to apply for any necessary agency permits or other authorizations.

Adopted August 26, 1998

Effective September 20, 1998

**SUBCHAPTER C: REGULATORY INCENTIVES FOR USING ENVIRONMENTAL
MANAGEMENT SYSTEMS**

§§90.30, 90.32, 90.34, 90.36, 90.38, 90.40, 90.42, 90.44

Effective December 16, 2001

§90.30. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) **Environmental aspect** - Element of a person's activities, products, or services that can interact with the environment.

(2) **Environmental impact** - Any change to the environment, whether adverse or beneficial, wholly or partially resulting from a person's activities, products, or services regarding a specific site.

(3) **Environmental management system** - A documented management system to address applicable environmental regulatory requirements that includes organizational structure, planning activities, responsibilities, practices, procedures, processes, and resources for developing, implementing, achieving, reviewing, and maintaining an environmental policy directed toward continuous improvement.

(4) **Site** - For purposes of this subchapter, any individual location or contiguous location of a person.

Adopted November 20, 2001

Effective December 16, 2001

§90.32. Minimum Standards for Environmental Management Systems.

A person may be eligible to receive regulatory incentives under this chapter if the site's environmental management system (EMS), at a minimum:

- (1) includes a written environmental policy directed toward continuous improvement;
- (2) identifies the environmental aspects at the site;
- (3) prioritizes these environmental aspects by the significance of the impacts at the site;
- (4) sets the priorities, goals, and targets for continuous improvement in environmental performance and for ensuring compliance with applicable environmental laws, regulations, and permit conditions;

(5) assigns clear responsibility for implementation, training, monitoring, and taking corrective action and for ensuring compliance with applicable environmental laws, regulations, and permit conditions;

(6) requires written documentation of the implementation procedures and the results of so doing; and

(7) requires a written evaluation, on a routine schedule, of the refinement to the EMS to demonstrate how attainment of the priorities, goals, and targets of the system has improved.

Adopted November 20, 2001

Effective December 16, 2001

§90.34. Regulatory Incentives.

Regulatory incentives may include, but are not limited to:

(1) on-site technical assistance;

(2) accelerated access to program information;

(3) modification of state or federal regulatory requirements that do not change emission or discharge limits;

(4) consideration of a person's implementation of an EMS regarding a specific site in scheduling and conducting compliance inspections; and

(5) inclusion of the use on an EMS in a site's compliance history and compliance summaries.

Adopted November 20, 2001

Effective December 16, 2001

§90.36. Evaluation of an Environmental Management System by the Executive Director.

(a) A person must submit written documentation of the person's environmental management system (EMS) for a specific site as part of a written request for an on-site evaluation of that site's EMS to the executive director to be eligible to receive regulatory incentives under this subchapter except as described in subsection (b) of this section. The documentation must include:

(1) the environmental policy statement as required in §90.32(1) of this title (relating to Minimum Standards for Environmental Management Systems);

(2) scope of the EMS (programmatic, geographic area, sites, facilities, or units included in the EMS);

(3) the prioritized environmental aspects for the site as required in §90.32(2) and (3) of this title;

(4) environmental improvement goals and targets for continuous improvement in environmental performance as required in §90.32(4) of this title;

(5) environmental performance indicators that the person measures to demonstrate the effectiveness of the EMS at the site including continuous improvement goals and audit functions;

(6) list of any independent or third-party reviews or certifications that have been completed on the EMS;

(7) main point of contact on the EMS;

(8) date when the requestor would be ready to have the executive director conduct a formal on-site evaluation of the EMS or whether the person will be requesting approval of the person's third-party auditor(s);

(9) a description of the regulatory incentives of interest to the person regarding that site;

(10) any other information requested by the executive director during the evaluation period;

(11) signature of the requestor or the duly authorized agent, that certifies that all information is true, accurate, and complete to the best of that person's knowledge.

(b) A person who qualifies as a Clean Texas Leader is exempt from providing documentation for the EMS regarding the specific site to the executive director if the information the person submitted to qualify to become a Clean Texas Leader is still current. Clean Texas Leaders must still submit a written request to the executive director for an on-site evaluation of the EMS to be eligible for regulatory incentives under this subchapter .

(c) If the request for regulatory incentives is solely to request additional incentives under the EMS regulatory incentive program for an EMS that has already been approved by the executive director, the person is exempt from the submittal requirements of subsection (a) of this section. The executive director will act on the request in accordance with the time frames in §90.40(d) of this title (relating to Executive Director Action on Request for Regulatory Incentives through the Use of an Environmental Management System). The person must instead submit the following information:

(1) a description of the additional regulatory incentives requested for the site;

(2) main point of contact for the EMS; and

(3) any additional information requested by the executive director to evaluate the regulatory incentive request including demonstration of attainment of environmental performance improvement goals or targets.

(d) Within 90 days of submission of the request for evaluation of an EMS, the executive director shall notify the requestor in writing of whether the information provided is complete or whether additional information must be submitted to the executive director.

(e) Within 90 days of submission of the request for an on-site evaluation of an EMS, the executive director will schedule with the requestor an on-site evaluation to be performed by the executive director or allow the use of the results from an approved third-party auditor that satisfies the evaluation criteria in subsection (j) of this section.

(f) The executive director will notify the person who submitted the request for evaluation of whether the EMS qualifies for regulatory incentives under this subchapter. If the EMS does not qualify for regulatory incentives under this subchapter, the executive director will send the person who requested an evaluation of the EMS a notice detailing where the EMS does not meet the standards in §90.32 of this title (relating to Minimum Standards for Environmental Management Systems).

(g) If the person makes no formal response within 90 days to the executive director's request regarding areas where the EMS does not meet the standard in §90.32 of this title, the EMS evaluation will be placed on inactive status and the person may be required to submit additional information to demonstrate compliance with this subchapter.

(h) If a person receives regulatory incentives under this subchapter for a specific site, the executive director will schedule a follow-up on-site evaluation by the executive director or authorize the use of an approved third-party auditor to conduct a follow-up on-site evaluation of the EMS at least every three years from the date of the initial evaluation. Regulatory incentives granted prior to the three-year evaluation will remain in effect until such time as the executive director terminates them under §90.42 of this title (relating to Termination of Regulatory Incentives under an Environmental Management System).

(i) Any areas in which the executive director or an approved third-party auditor finds the EMS does not meet the standards in §90.32 of this title during the follow-up evaluation shall be corrected in accordance with the schedule required by the executive director. If the deficiencies are not corrected within the time frame allowed or are of such a nature to indicate the EMS no longer meets the standards of this subchapter, the regulatory incentives may be terminated under §90.42 of this title.

(j) In order for the executive director to approve the use of a third-party auditor(s) to complete the on-site evaluation of the EMS or to recognize the results of past evaluations completed on an EMS as equivalent to the executive director's review process, the following criteria shall be considered by the executive director:

(1) ability of the auditor's EMS review protocols to meet the same requirements as the executive director's audit protocols;

(2) ability of the auditor's documentation of the EMS evaluation process to provide comparable information to the commission that the executive director would collect if completing the same evaluation;

(3) independence of the third-party auditor completing the evaluation;

(4) demonstrated experience of the auditor in EMS programs and environmental regulatory programs and auditing;

(5) method of audit review - time allotted for review of documentation versus field observation and personnel interviews to confirm performance of EMS;

(6) educational background of auditor;

(7) certifications already granted to the auditor by other audit/standards bodies for EMS or auditing methodologies; and

(8) any other information the executive director deems necessary to verify the capability of the auditor to complete the evaluation process as the executive director would have if he completed the evaluation.

Adopted November 20, 2001

Effective December 16, 2001

§90.38. Requests for Modification of State or Federal Regulatory Requirements.

(a) Persons who request modifications of state or federal regulatory requirements which cannot be authorized by any other approval method except a commission order must follow the requirements of Subchapter B of this chapter.

(b) Persons who request modification of federal regulatory requirements under this subchapter must also meet the standards for the EPA's National Environmental Performance Track (NEPT) Program in order to receive federal regulatory incentives.

Adopted November 20, 2001

Effective December 16, 2001

§90.40. Executive Director Action on Request for Regulatory Incentives through the Use of an Environmental Management System.

(a) Executive director action on regulatory incentives authorized by rule is not required. Regulatory incentives authorized by rule may be implemented as soon as the person is notified that its environmental management system (EMS) meets the requirements of §90.32 of this title (relating to Minimum Standards for Environmental Management Systems).

(b) Where approval by the executive director is required under this subchapter, the executive director shall consider, among other factors:

- (1) the compliance history of the person who submitted the EMS; and
- (2) the efforts made by the person to include stakeholder involvement and environmental reporting of the person's EMS internal and external to the site with consideration of the size, resources, compliance history, environmental impact, and other operational factors of the specific site;
- (3) the person's participation in voluntary programs for environmental improvement; and
- (4) if the request is specifically for additional incentives after the evaluation of the EMS has been completed and approved, or for reconsideration of granting an incentive that was previously denied, the progress made at a site toward the environmental improvement goals and compliance assurance targets listed in the site's EMS will be considered in granting further regulatory incentives.

(c) When considering regulatory incentives which modify state or federal requirements, the executive director shall consider the steps the person has taken at the site to develop an EMS that exceeds the minimum requirements in §90.32 of this title.

(d) Where approval by the executive director is required under this subchapter, the executive director shall act within 60 days of notifying the person that the EMS meets the standards outlined in this subchapter. If a request for additional regulatory incentives is submitted under §90.36(c) of this title (relating to Evaluation of an Environmental Management System by the Executive Director), the executive director shall act on the request within 60 days of its submission. These time frames may be extended at the request of the person or the executive director to allow additional approval time for incentives that require approval by the EPA for implementation or adoption by rule.

Adopted November 20, 2001

Effective December 16, 2001

§90.42. Termination of Regulatory Incentives under an Environmental Management System.

(a) Termination by the recipient.

(1) A person who receives regulatory incentives for a site through the use of an environmental management system (EMS) that meets the standards in this subchapter may terminate the regulatory incentives at any time by sending a notice of termination to the executive director by certified mail.

(2) Once a regulatory incentive is terminated, the site for which a person has requested incentives must be in compliance with all permits, existing statutes, or commission rules affected by the regulatory incentives granted at the time of termination except as otherwise provided in this section.

(3) If the regulatory incentives approved involve the use of an order, the person who received the regulatory incentives shall comply with the applicable provisions of §90.20 of this title (relating to Termination).

(b) Termination by the executive director.

(1) Noncompliance with the terms and conditions of the regulatory incentives, Texas Water Code, §5.127 or §5.131, or this chapter, may result in the regulatory incentives being terminated.

(2) If a person who is approved to use regulatory incentives for a specific site under this subchapter is found by the executive director or an approved third-party auditor to no longer meet the requirements of this subchapter, the executive director shall notify the person in writing of the deficiencies found.

(3) Any areas in which the executive director or an approved third-party auditor finds the EMS does not meet the standards in §90.32 of this title (relating to Minimum Standards for Environmental Management Systems) during the follow-up evaluation shall be corrected in accordance with the schedule required by the executive director. If the deficiencies are not corrected within the time frame allowed or are of such a nature to indicate the EMS no longer meets the standards of this subchapter, the regulatory incentives will be terminated under this section.

(4) In the event regulatory incentives are terminated under this section, the executive director may specify an appropriate and reasonable transition period to allow the site previously operating under regulatory incentives to come into full compliance with all existing commission requirements, including time to apply for any necessary permits or other authorizations.

Adopted November 20, 2001

Effective December 16, 2001

§90.44. Motion to Overturn.

Any person who has requested approval of an environmental management system (EMS) and whose EMS was denied approval, any person who has been notified by the executive director that the approval for the person's system has been terminated, any person who has been denied regulatory incentives that the executive director is authorized to approve under §90.40 of this title (relating to Executive Director Action on Request for Regulatory Incentives through the Use of an Environmental Management System), or who has been notified by the executive director that a regulatory incentive has been terminated, may file with the chief clerk a motion to overturn the executive director's decision. A motion must be filed within 23 days after the date the commission mails notice of the executive director's decision to the person. Timely motions are subject to §50.139(e) - (g) of this title (relating to Motion to Overturn).

Adopted November 20, 2001

Effective December 16, 2001